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FORENSIC SPEAKERS.

ERSKINE—CURRAN—LYNDHURST—BROUGHAM—O'CONNELL—WILDE.

THAT 'ancient chancellor' Sir John Fortescue, in his admirable treatise in commendation of the laws of England, observes, "and in mine opinion it is to be judged for no small point of the bountiful goodness of God, that out of the generation of judges there have hitherto sprung up more states and peers of the realm than out of any other state of men, which by their own wit and policy have aspired to great wealth, nobility, and honor. Yea, though the state of merchants surmount the number of judges by many thousands, being men of such singular wealth, that among them commonly there be such, as one of them in riches passeth all the judges of the realm. For this cannot be ascribed to fortune, which is nothing: but is to be attributed (as I take it) only to the blessing of God. Forsomuch as by his prophet he saith that the generations of righteous men shall be blessed." What was true in the days of Henry VI. has continued true to the present hour. No state of the realm, not even the diplomatic, the military, or the naval, has, in the words of George Canning, contributed, or continues to contribute, so many 'fresh streams to the stagnant lake of collected honors' as that of judges, or, otherwise to speak, of the bar; for the judges are only the most able, or the most fortunate as it may happen, of the legal multitude. But prolific as the bar has been of men who aspired to, and deserved the dignity of, the peerage, is it not curious to find that it should have produced so few orators? Is it not strange, that of men exercised all their lives in speaking, no great number should have won high oratorical fame even as advocates, and that a list of individuals singularly small should have achieved the like renown in the noble arena of the senate? And surely this is the more and more a matter of wonderment when we consider how high has always been the estimation of the bar in England, and of what class of society it was constituted, and when we perceive that in France where the bar by no means enjoy equal advantages, it has been, and is to this day, the fruitful nurse of orators and statesmen. Candidly, however,

we must confess, that our surprise rather stretches backwards than busies itself upon the present day. We think it not very difficult to assign a reason for the paucity of oratorical talent amongst the modern race of successful practitioners at the bar. The preliminary education—the course of study—the habitudes of labor—the nature of the practice which opens a career to the junior barrister, are all rather calculated to mar than to make an orator ; whilst all those high attainments and qualifications which are essential to the scholar and the philosopher, the statesman and the orator, are, if not actually a hindrance, certainly no assistance to the junior barrister in his progress to the early emoluments and later dignites of his profession. The hours which should be devoted to these might be more usefully employed by one who has to deal with law as a mechanical art and not as a science. But at a time when lawyer and man of learning were synonymous terms—when to enter even upon the study of the law required a familiar knowledge of Latin and French, beside our native English—when a better and more liberal education was to be obtained at our Inns of Court than at any University, or any where else in the world, our astonishment cannot fail to be great, that of a body of gentlemen so instructed and so reared as the members of the bar were formerly, so few should have left a name behind them, or bequeathed to us works to which we may turn for even models of forensic eloquence ! Another quotation from Fortescue will serve to shew the nature of the education at the Inns of Court, and the character of the barristers there brought up—a character which their successors long continued to maintain,—and moreover, to account for the justness of the wonder, that out of such seed sown in such goodly ground, there has been so scanty a harvest and increase. "Thus (he says) it falleth out that there is scant any man found within the realm skillful and cunning in the laws, except he be a gentleman born, and come of a noble stock. Wherefore, they more than any other kind of men, have a special regard to their nobility and to the preservation of their honor and fame. And to speak uprightly, there is in these greater Inns (yea and in the lesser too,) beside the study of the laws, as it were a university or school of all commendable qualities requisite for noblemen. There they learn to sing and to exercise themselves in all kinds of harmony. There also they practice dancing and other noblemen's pastimes, as they use to do which are brought up in the King's house : on the working daies most of them apply themselves to the study of the law, and on the holy-daies to the study of Holy Scripture ; and out of the time of divine service, to the reading of Chronicles. For there, indeed, are virtues studied and vices exiled. So that for the endowment of virtue and abandonment of vice, knights and barons, with other states and noblemen of the realm, place their children in those Inns, though they desire not to have them learned in the laws, nor to live by the practice thereof, but onely upon their father's allowance." In the olden time, then, the lawyer, the scholar, and the accomplished gentleman were one : and to take an example of a more recent date,

such was Lord Bacon! It were idle to say why have we not on the page of history more Lord Bacons?—Genius here asserts its sovereign power—

"For nature made him what he was,
And ne'er made such another."

But why, of this illustrious body of lawyers, scholars, and gentlemen, have we not more individuals of whom, as statesmen and orators, we could boast? The often cited statement of Cicero respecting the extreme paucity of orators, in comparison with all other classes of famous men, will not supply a satisfactory answer. For if England were formerly looked to for orators at all, it was out of this very class they were to be expected.

If, however, they came forth under the old system, very few and very far between, there is little likelihood of their issuing out in any multitude under the new, where all that is necessary to constitute a practitioner of the law, is a certain diligence in dining in a prescribed locality—the payment of fees—and, a wig and gown.

But in the progress of years, there are always found some few men whose native energy and vigor of intellect would, as was said of the elder Cato, elevate them to lofty place, no matter in what profession or walk of life fortune might have cast them: and to such men, members of the bar, we can point even now, as will be shewn by and bye. But first, to speak of those no longer of this world. Erskine was the best forensic speaker that modern times have known, and he is the only English barrister now enduringly remembered as a great advocate. The enthusiastic student at law in another generation will turn to the volume which contains his speeches—the student who fondly longs for the fame of Demosthenes or Cicero; by all others he will be forgotten. Curran will probably keep a stronger hold upon men's minds, not alone for the fascinating style of his eloquence to the young and the many, but because of the stirring historical scenes with which his efforts are associated. The rest of those who in their little hour were supposed to be famous men, are already motionless by Lethe's wharf. Of celebrated living advocates retired from the bar, there are three, whose renown in other respects for good or evil, is such as to sink into insignificance their forensic fame. History, when she records their actions, will hurry over it in a single sentence. The individuals to whom we allude are Lord Lyndhurst, Lord Brougham, and Mr O'Connell. All three were forensic orators, unequalled in their own time, in their several departments. All three are men of great ability. Brougham's eloquence at the bar was well known and appreciated, and he has done all he can to preserve its memory for other times, by publishing his speeches. But it is doubtful whether, though he have again breathed into them, they will be able to fulfil his mandate, and live. It is doubtful whether their intrinsic merit be such as to keep them buoyant above the tide of time, without the aid of those circumstances under whose auspices they were originally brought forth. Notwithstanding his mighty energy, and illusive vehemence, his com-

mand of sounding words that always came in the precipitous flow, and often with the force and grandeur of a cataract—he was, as an advocate, far inferior to Lyndhurst or O'Connell. His mind is naturally tortuous, his temper capricious, his disposition perverse, his judgment warped, his discretion continually at fault. As the tree in its fullest autumnal foliage is acted upon by the blasts of the wind, so is he a slave to every gust of passion which agitates and gives a voice to his thronging thoughts. He is an egotist to a ludicrous and pitiable extent. He lacks, moreover, the reasoning power, and that accuracy of knowledge on which alone a man can lean with vigorous confidence, and from which he can spring aloft with irresistible power. In some of Brougham's happiest efforts the ground has sunk a little under him; and whenever he attains a height, he fails not to bring up the mud along with him.

Lord Lyndhurst is remembered as one of the most elegant, and at the same time one of the most able, speakers that ever adorned the English bar. In a word, in addition to oratorical powers rarely surpassed, he possessed sound discretion, great powers of argumentation—various and well digested knowledge, and a zealous devotion to the interests of his client, to the postponement of mere self.

The last of the three was, as a forensic orator, perhaps the greatest. In truth, it is impossible to conceive a more powerful advocate than Mr O'Connell was before a judge and jury. They who have heard him in Parliament only, can form no notion of the man such as he was whilst wielding men's minds in his natural sphere of action. Impassioned and vigorous as Brougham, discreet, argumentative, and zealous for his client, and forgetful of himself as Lyndhurst, he had a playfulness of humor, a readiness of wit to affix an irresistably ludicrous epithet, or apply some story fraught with ridicule in an appalling degree, where he pleased,—a power, moreover, of deepest pathos, to which the former two were strangers. No man that ever spoke, did probably possess the power of moving the feelings and passions of a jury in the same degree as Mr O'Connell. It was not with him as with Curran, when touching words were delivered in a shrill cracked voice, without due pause or emphasis, or variety of intonation. The deep melody of O'Connell's voice added force and dignity to what he uttered. The minor tones struck upon the heart with the solemn music of a distant bell at night-fall. To borrow the language of his country's bard,

> "He ruled like the wizard the world of the heart,
> And could call up its sunshine or draw down its showers."

But these three mighty masters of forensic eloquence are withdrawn from the arena in which they were so frequently crowned victors: we have spoken of them with the freedom allowed towards persons who belong to history. To do the same with their successors were an invidious task, upon which, in our own person, we should be little disposed to enter: but we find it in some sort done to our hands, and

hesitate not to avail ourselves of it, having, in the first place, guarded ourselves by stating, that in quoting the opinions of another writer we are not to be by any means understood as sharing them. In a series of essays lately published, and entitled 'Pen and Ink Sketches of Politicians,' some of our leading lawyers, being members of Parliament, are introduced. They are treated of in their forensic as well as their parliamentary capacity; and this, with considerable knowledge and ability, and with fairness as between man and man, although in every instance with extreme severity, either as regards the speaker or the politician. The freedom of language indulged in towards distinguished characters is carried to an extent, even when well-founded, of which we cannot approve; yet there certainly is something exciting and curious withal in these latter days to find a writer dealing with the living without fear or favor, without anger as without zeal. In the series of sketches are to be found Sir Thomas Wilde, Sir Edward Sugden, Sir Wm. Follett, Sir F. Pollock, Sir John Campbell, Mr Macaulay, and Lord Abinger. The two latter we should not be justified in considering as actually belonging to the bar. Yet it is difficult to separate the latter from it, so long did he there play a conspicuous part. The following is the writer's estimate of the Solicitor General as an advocate:—

He combines in his own person all that is scattered in the way of natural gifts or acquired possessions amongst his learned brethren. He has more than the technical legal lore of Campbell—he has all the lucid arrangement and power of argumentation that distinguish Follett, and he has, besides, feeling, energy, and passion, of which these two are quite incapable. But he is not an orator, for he is of the 'earth—earthy,' albeit, superior to the others. There is no touch of poetry in him—he dreams no dreams—he sees no visions—he has no divine whisperings—the breath of the living God is never breathed into him. He is the speaker of the iron mace; the keenness and the polish of the steel is all a-wanting. But he has the one great thing, which Erskine, with all his vanity, also had, and that is the power of utter oblivion of mere self in the advocate—the power, as the Germans style it, when speaking with reference to the mighty poets Homer and Shakspeare, of self-annihilation; so that there shall be no sign or savour of the mortal man in his work. This makes Wilde the safest of all counsel, as he is the best. His knowledge of the heart and brain of man is vast and profound—his sagacity is extraordinary even amongst lawyers—his quickness of apprehension is electric. He deals with a witness as though no thought, design, or feeling of his could be shrouded from him by the veil of the flesh. He disentangles the most involved and perplexed case of all its difficulties, and places it plain and clear before the jury. His reasoning is beautifully lucid, and withal earnest, which adds powerfully to its effect, and perhaps the more so from the rarity of the combination, for things clear are generally cold. He addresses himself always to the understanding rather than to the feelings, and he does so after a manner which is flatter-

ing to the self-love of the humblest common juryman. By the exercise of consummate art, he appears to be perfectly natural and sincere. For the time, it seems not so much that he has descended to the level of his jury, for such one may emphatically call it, but that he has raised their intellects to a level with his own. There is in him, moreover, none of that show of cajolery that there used to be about Scarlett; he assails not his audience with the petty artillery of "nods and winks, and wreathed smiles," nor does he ever labor to make men's feelings play false with their judgment, nor does he ever indulge, as Brougham used to do, in unnecessary vehemence and virulence of speech. His whole efforts are directed to convince. No man at the bar has either such extensive or such lucrative practice as the Solicitor General.—[Monthly Law Magazine.

RECENT AMERICAN DECISIONS.

Supreme Court of Missouri, May, 1840.

BROWN v. KNOX AND OTHERS.

The validity of an assignment made in Pennsylvania, by parties residing there, but which is to affect property in Missouri, will be determined by the laws of the latter state, when called in question there.

An assignment of property by debtors for the benefit of their creditors, which stipulates a release of the debtors by all who become parties to the instrument, is fraudulent and void as against the rights of subsequent attaching creditors.

It seems, that if an assignment is unexceptionable in other respects, the mere fact of a schedule being annexed, containing a list of preferred creditors and a description of their claims without showing the amount of each claim, will not of itself be sufficient to invalidate the instrument, or raise any presumption of fraud; but it might be different in an instrument requiring the creditors to accept terms and conditions.

It seems, that where an assignment, which contains a list of preferred creditors, is set up in opposition to the claims of an attaching creditor, the party offering the instrument must establish the *bona fide* existence of the preferred debts, before a party seeking to overthrow it is bound to throw suspicion upon it as fraudulent.

ERROR TO THE ST. LOUIS CIRCUIT COURT.

THIS was an action of assumpsit, brought by George Brown against John Knox, James Boggs, and James A. Knox, upon sundry notes executed by them to Wm. McKee & Co., and indorsed to the plaintiff. An affidavit was made that the sum due, after giving all just credits, was at least $18,000, and an attachment was issued, upon which various persons in different parts of the state were summoned as garnishees.

Wm. Wilson and David Knox interpleaded, and claimed all the debts and effects attached. The issue thus made up between the interpleaders

and the plaintiff was submitted to the court, sitting as a jury, who found in favor of the claimants. The plaintiff moved for a new trial, because the finding was against the law, against evidence, and against the weight of evidence, and because the deed of assignment offered in evidence was void. The motion was overruled by the court, and a bill of exceptions taken to the opinion of the court.

From the bill of exceptions it appeared, that, in eighteen hundred and twentyfive, John Knox and James Boggs were in partnership in Philadelphia, under the firm of Knox and Boggs; that they then took into the concern David Boggs, when the style of the firm was changed to Knox, Boggs & Co. In eighteen hundred and thirtyone, David Boggs retired from the firm, and the style of the firm was again changed to Knox and Boggs. In January, eighteen hundred and thirtysix, James A. Knox was admitted a partner, but brought no capital into the concern, and received only one tenth of the profits. The firm was then styled Knox, Boggs & Co., and continued thus until May, eighteen hundred and thirtyseven, when an assignment was made of the effects of the firm of Knox and Boggs, and of Knox, Boggs & Co., to Wilson and Knox, the interpleaders.

The assignment was made of all the property of the firm, both joint and several, and executed by all the partners; notices of the same were published in the Gazettes of Philadelphia, and circulars were sent to the debtors of said firm. It was proved that the assignees forthwith took possession of the property and effects assigned, and have been ever since acting in discharge of the trust. It was also testified by a witness, who declared himself to be a lawyer of Philadelphia, that the deed was drawn up by him, and was in the usual form of such conveyances in Pennsylvania, and by the laws of Pennsylvania was good.

The trusts declared in the deed were, 1*st*. That the trustees shall dispose of the property and collect the debts assigned. 2*d*. Out of the proceeds, pay the expenses of the trust and retain a compensation to themselves. 3*d*. Out of the separate estate of each partner, pay the household and family expenses, &c. of each partner respectively. 4*th*. Pay debts in certain specified schedules, to the number of four; and *Lastly:* To pay the residue of all such of their creditors as would execute a release within the term of three months, if they lived within the United States, or nine months, if they lived without the United States.

The deed contained the further provision, that after the payment of all the debts therein specified, the surplus, if any, should revert to the assignors.

The schedule annexed contained a list of preferred creditors, with a description of the nature of their respective claims, as for money lent, acceptances, &c., but did not show the amount of the claim. The amount of assets asssigned was set down in the schedule as exceeding half a million of dollars; and creditors to the amount of one hundred

thousand dollars came in and executed releases. There was no proof as to the *bona fide* character of the preferred debts.

It was admitted that the plaintiff resided in Baltimore, and that all the debts, effects, &c. in the hands of the garnishees, were embraced in said deed of assignment ; and the only dispute was as to the validity of the assignment.

The opinion of the court was delivered by

NAPTON J.—Before examining this question it will be proper to dispose of a preliminary one, started in the argument of this cause. The interpleaders claiming under a deed made in Pennsylvania, and the plaintiff being a resident of Baltimore, it is urged that the principles of comity require that the validity of this instrument should be determined in this court by the laws of Pennsylvania. It is not very well perceived how the law of comity can be applicable to the consideration of an instrument, which is attacked on the ground of fraud in fact ; or, because its provisions so far contravene the established policy or express enactments of our law, as to constitute fraud *per se*. But, admitting that our courts would be bound, upon principles of comity, to give effect to an assignment made in Pennsylvania, as against creditors living in that state, upon what principle must the Pennsylvania law be administered here to a creditor who resides in Maryland ? Why may not he insist on the *lex domicilii* with the same justice as the assignor who lives in Philadelphia ? The *lex loci contractus* can hardly apply in this case, inasmuch as the creditor sueing never acceeded to the terms of this assignment, and was no party to the instrument ; and the law of his domicil may as well be applicable to the contract on which he sues, as the law of the interpleaders' domicil to that contract on which they rely. The only reasonable and plain rule in this case seems to be, to administer the law of this state, the state in which the property lies ; where the suit is brought ; and whose laws are invoked for the protection of the rights of the respective parties. Whatever may be the construction given to instruments of this character in Pennsylvania, then, I shall proceed to consider the light which they are viewed by the law of Missouri, in the opinion of this court.

The first and most important question involved in this consideration, is the validity of a stiputation for a release, in the instrument of assignment under which the interpleaders claimed.

It is conceded that this is a question of the first impression in this state. The point has been neither collaterally or directly before the court in any previous case. It is conceded, also, that the adjudication of the courts of our sister states, have, on this subject, been various, conflicting, and unsatisfactory. The weight of authority has been claimed on either side, and I apprehend that a very brief examination of the state of judicial opinion, will make it obvious that this court may, with propriety and a due respect to the opinions of other tribunals, look only to justice, to reason and morality, and to the letter and spirit and policy of our laws, for their rule of action.

In 1826, Judge STORY, in the case of *Halsey v. Whitney*, (4 Ma-

son 206) reviewed the state of judicial opinion in the United States, up to the time of that decision. He prefixes his own opinion, untrammeled by authority. "This objection (says Judge STORY, speaking of a stipulation for a release) has struck me to be of great force, and I paused upon it with no small hesitation of opinion. Where a debtor assigns *all* his property, for the benefit of *all* his creditors, without stipulating for any favor to himself, he cannot be said to lock up his property from his creditors. The most that can be said, is, that he locks it up from one, by giving it, unconditionally, to all. But, when he stipulates for a release, he surrenders nothing except upon his own terms. He attempts to coerce his creditors, by withholding from them all his property, unless they are willing to take what he pleases to give, or is able to give, in discharge of their debts. This is certainly a delay, and, if the assignment be valid, to some extent a defeating of their rights. It is not sufficient to say that it is a proposition to creditors: so would be a condition by the debtor to receive a gross sum. The object and nature of the proposition are to be considered, in order to decide whether it be fraudulent or not. Has it not a tendency to obstruct the common right of the creditors? Is not its design to prevent creditors from receiving compensation out of the debtor's property, without yielding up some portion of their debts, and conferring on him a substantial benefit, which he has no legal claim to demand?"

The learned judge then proceeds to review the adjudicated cases; and, after examining the cases of *Seaving v. Brinkerhoff*, (5 Johns. Ch. R. 329); *Hyslop v. Clarke*, (14 Johns. R. 459); *Austin v. Bell*, (20 Johns. R. 442), he admits, that the courts of New York, though the point had not been expressly determined, had evinced a decided leaning against the validity of such stipulations. In Massachusetts, the question remained, in Judge STORY's opinion, *in equilibriis*, so far as judicial action was concerned; but the prevalence of such stipulations, without objection, in that state, induced him to conclude that the opinion of the profession was decidedly in favor of the debtor on this point. In Pennsylvania, but one decision had been made, *Lippincott v. Barker*, (2 Binn. 174), at the time of Judge STORY's decision of *Halsey v. Whitney*; and in that, the stipulation was sustained; but was sustained, as Chief Justice TILGHMAN declared, under the particular circumstances of the case, and was not designed to settle the general principle. Judge BRECKENRIDGE declined going even to that extent, but declared the stipulation void under all circumstances. But one British authority was alluded to by Judge STORY, and that was a case in the Exchequer, *Braddock v. Watson*, (3 Price's Rep. 6), in which the assignment was held good, notwithstanding the stipulation for a release.

The conclusion to which Judge STORY arrived, on an investigation of these authorities, was this:—"I am free to say, that if the question were entirely new, and many estates had not passed, upon the faith of such assignments, the strong inclination of my mind would be

against the validity of them. As it is, I yield, without reluctance, to what seems the tone of authority in favor of them."

Such was the state of judicial opinion in 1826, when Judge STORY yielded his own conviction to what he regarded as "the tone of authority." We will see how the authorities stand since that period, and, for that purpose, I avail myself of the compilation read at the bar, (Angell on Assignments) and take the statement of its author for the titles and character of the decisions, as late as 1833.

In 1833, the case of *Brashear v. West* and others, was decided by the supreme court of the United States, (7 Peters R. 608.) In that case, Chief Justice MARSHALL, in delivering the opinion of the court, observed, "the objection (to a stipulation for a release) is certainly powerful, that its tendency is to delay creditors. If there be a surplus, this surplus is placed, in some degree, out of the reach of those who do not sign the release, and thereby entitle themselves under the deed. The weight of this argument is felt. But the property is not entirely locked up. A court of equity, or courts exercising chancery jurisdiction, will compel the execution of a trust, and decree what may remain to those creditors who have not acceded to the deed. Yet we are far from being satisfied, that, upon general principles, such a deed ought to be sustained.

"But whatever may be the intrinsic weight of this objection, it seems not to have prevailed in Pennsylvania. The construction which the courts of that state have put on the Pennsylvania statute of frauds, must be received in the courts of the United States."

Chief Justice MARSHALL here apparently yields his own conviction, that, upon general principles, these stipulations cannot be sustained, to what he supposes to be the settled construction of the courts of Pennsylvania. In ascertaining that settled construction, he relies on the cases already alluded to, and referred to by Judge STORY in the case of *Halsey v. Whitney*, of *Lippincott v. Barker*, and *Pierpont v. Graham*, (4 Wash. R. 232.)

Let us examine this case of *Lippincott v. Barker*, upon which Chief Justice MARSHALL and Judge STORY rely, as authority for declaring the settled law of Pennsylvania. Chief Justice TILGHMAN delivered the opinion of a majority of the court in that case, and, after sustaining the assignment, says (2 Binn. R. 182,) "I beg, however, to be distinctly understood, that my opinion is confined to the circumstances of the present case,—for there are many and strong objections to the deeds of assignment, made without the privity of creditors, and excluding all who do not execute releases." Judge BRECKENRIDGE declared, "I think it to the let and hindrance of creditors, and that such disposition is void, both at common law and by statute; though not fraudulent in fact, yet fraudulent in law, and therefore void."

One would suppose that there was nothing very decisive in this opinion in favor of these stipulations. Chief Justice TILGHMAN expressly declaring, that he was not to be understood as sustaining the general principle, but justifying his conclusions on the particular circumstances

of the case ; Judge BRECKENRIDGE avowing his convictions, that no circumstances could make such deeds valid in law.

In *Mackie v. Cairns*, in New York, (1 Hopkins's Ch. R. 373 ; 5 Cowen R. 547) the assignment provided that if any of the creditors should have attached, such creditors should be excluded, unless they would relinquish their attachments ; and this provision was held illegal and void. In *De Caters v. Le Ray de Chaumont*, (3 Paige's Chan. Rep. 178), we are told by Mr Angell, (Angell on Assignments, 107), "an assignment of the debtor, which contained a provision for distribution of the effects among such of the creditors as should come in and accept the provision made for them, and execute releases, was carried into effect by the court of chancery, without any intimation from the court or counsel, that such a stipulation was illegal." Here the point, it seems, was not made ; but, in the same state, in the subsequent cases of *Armstrong v. Byrne*, (1 Edwards's Ch. R. 79), and *Lentilhon v. Moffat*, (ib. 451), such stipulations were repudiated by the court, and pronounced a hindrance and delay of creditors.

In Massachusetts, the decision in *Halsey v. Whitney* seems to have been followed, up to 1829, and since that time we have no information that the validity of assignments, containing stipulations for releases, has been questioned in that state. Such, also, has been the current of decisions in Rhode Island. (Angell on Assignments, p. 112.) In Maine, the same conclusion was arrived at in the case of *Fox v. Adams*, (5 Greenleaf's R. 245), and on the authority of the case of *Halsey v. Whitney ;* but subsequently to that decision, the district court of Maine held, in the case of *Lord v. Brig Watchman*, (Angell, 113), that an assignment by an insolvent debtor of all his property to trustees, in trust for the benefit of such of his creditors as should become parties to the assignment, and release their debts, was fraudulent. A similar adjudication has been made in Connecticut. (Angell, 114.)

Such is the relative weight of authority since Judge STORY's decision in *Halsey v. Whitney*, up to 1833 ; on this state of facts, the author on the compilation on assignments concludes, that the weight of American authorities was, at that date, in favor of the validity of such stipulations.

It remains to be seen, how the authorities have been since the publication of that work. The case of *Atkinson v. Jordan*, in Ohio, was decided in 1832, previous to the publication from which I have quoted authorities, but is not noticed in that work. In that case, (5 Ohio Rep. 293), the court reviewed all the authorities, and upon the weight of authority, as well as upon principle, declared such stipulations for releases, null and void. In New York, perhaps the most commercial state in the Union, the court of errors, after an elaborate argument, in the case of *Grover v. Wakeman*, determined such stipulations to be void and fraudulent. (11 Wendell 187.) Judge SUTHERLAND, after noticing the conflict of authorities on the subject, declared his opinion, that it was time that some plain, simple, but com-

prehensive principle, should be adopted on the subject. "In the absence of a bankrupt law," he proceeds, "the right of giving preferences must probably be sustained. Let the embarrassed debtor, therefore, assign his property to whom he pleases; but let the assignment be absolute and unconditional; let it contain no reservation or conditions for the benefit of the assignor; let it not extort from the fears and apprehensions of the creditors, or any of them, an absolute discharge of their debts as the consideration for a partial dividend; let it not convert the debtor into a dispenser of alms to his own creditors; and above all, let it not put up his favor and bounty *at auction* under the cover of a trust to be bestowed upon the highest bidder. After the maturest reflection on this subject, I have come to the conclusion that the interests, both of creditor and debtor, as well as the general purposes of justice, would be promoted, if the question is still an open one, by confining these assignments to the simple and direct appropriation of the property of the debtor to the payment of his debts."

The decisions on this point in England are but few, in consequence of their bankrupt laws rendering such assignments rarely, if ever, necessary. A case determined in the Exchequer, *Rex v. Watson*, (3 Price R. 6), has been frequently referred to by the several judges in this country, who have sustained such assignments, as authority in support of such opinion. The decision of the court in that case cannot, I think, be entitled to great weight here, when we reflect that it was the policy of the British legislature, as evinced in their bankrupt laws, to relieve debtors from future liability on giving up their entire property to their creditors.

On reviewing the various and conflicting opinions, it will be seen that the opinions of three eminent jurists, Judge STORY, Chancellor KENT, and Chief Justice MARSHALL, were against the validity of these stipulations for releases, notwithstanding two of them decided on the supposed authority of prior decisions, in their favor.

And it is worthy of remark, that scarcely any judge, in deciding favorably to such assignments, has failed to accompany such decision with a declaration, either of his marked aversion to these stipulations, upon principle, or of great doubts as to their propriety and legality. In Ohio, New York, Maine, and Connecticut, courts of the highest authority have pronounced them fraudulent; whilst in Massachusetts, Rhode Island, and Pennsylvania, the decisions have been conflicting, but preponderate in favor of the validity of the stipulations for a release.

In this state of judicial opinion, it will not be considered as assuming too much to say that this court may safely take up the subject, untrammeled by authority, and pronounce that judgment which a fair construction of our statute of frauds, and the general policy of our laws, will justify.

In examining this question on principle, the only matter of astonishment, it seems to me, is, that courts in this country could ever have been induced to give a judicial sanction to what seems to be neither

more or less, in its incipient state, than a species of mercantile legislation. Debtors have succeeded by these contrivances in making bankrupt laws for themselves, notwithstanding the legislative bodies, both federal and state, have declined to pass laws to relieve them from their liability to pay their debts. This alone, in my opinion, constitutes a fatal objection to any assignment, in which the debtor makes over his property on condition that his creditors shall release him from liability. Shall it be said that the debtor has a right to make terms, and that when he succeeds in making such as are beneficial to himself, and such as the law itself would not give him, it is a matter of contract, and therefore valid? To make a contract of any validity, I suppose it will be granted, there must be parties to such contract capable of contracting, and voluntarily assenting to such contract. How can the creditor be said to give any assent to this contract, when, in point of fact, if these assignments be valid, he is under moral duress when he signs the deed? The debtor has his creditors completely in his power, and says to them, "You may take this fifty cents on the dollar of all I owe you, or nothing." There is no choice left with the creditors, but to come in and take half or a fourth of their debts, as the case may be, and then, in consideration of this favor, release all claims for the balance.

It has been said that the judicial decisions, against the validity of these instruments, have been a species of judicial legislation, enlarging the operation and bearing of the statute of frauds. It seems to me that with much more propriety, it might have been said, that the decisions sustaining these assignments, have been judicial legislation, not enlarging the operation of any statute in existence, but creating what our legislatures have refused to make, an act of bankruptcy. The statute of frauds declares that all deeds made with intent to hinder and delay creditors, shall be deemed fraudulent and void. I do not place the invalidity of these stipulations for release upon the sole ground that they occasion a delay, and are, therefore, within the letter of the statute. Delays, to some extent, are occasioned by all assignments, whether containing such a stipulation or not; though the delay is somewhat greater in the one case than in the other. There might be much difficulty in determining precisely what amount of delay should annul the deed; and when it is not unreasonable, as I think the case in this particular deed, it would not, of itself, be sufficient to warrant a court in declaring such a deed to be a fraud *per se*. But, in addition to the delay gained, the debtor obtains a benefit, and a most material benefit, which the law of itself does not give him, and obtains it too, by a species of compulsion on the creditor.

Whatever may be said in favor of the policy and humanity of a bankrupt law,—and it is not intended here to question them—our legislature has not seen fit to enact any law, by which the debtor can escape his liabilities by delivering up his property. On the contrary, the spirit of our leglislation, so far as it has gone on this subject, as evinced in the insolvent laws enacted, excludes all debtors who seek

to give preferences to one creditor over another, from the benefit to be derived from those laws. It appears then to be in strict conformity to the letter and spirit of our statute of frauds, consonant to the general policy of our statutes, and, I think I may add, accordant to sound views of morality and common honesty, that a debtor should not have the privilege of dictating terms to his creditors, and of excluding a *bona fide* creditor from all benefit in his property, who will not accede to those terms. Such is the view entertained by every member of this court, and the circuit court ought, in my opinion, to have declared this assignment fraudulent and void, as against the rights of the attaching creditors.

This view of this assignment might well dispose of this case; but other objections have been taken, which, as they are fairly up, I will proceed to notice. The schedule annexed to this assignment was objected to, as imperfect, insufficient, and a badge of fraud. The schedule contained a list of preferred creditors, but did not specify the amount of their several claims. In my opinion, if this deed was unexceptionable in other respects, and imposed no terms on the remaining creditors, no such omission would be sufficient, of itself, to invalidate the deed, nor would it raise any presumption of fraud. But in this case it was very material, to enable the creditors to determine whether they would accept the terms held out or not, that they should have the means of ascertaining the probability of deriving any benefit from the conveyance. A mere list of the names of the preferred creditors could throw no light on the subject.

Some estimate of the aggregate amount of preferred claims, if not the specific items, would seem to be reasonable and attainable This position is sustained, I think, by the observations of Judge Story in the case of *Halsey v. Whitney*, where a similar objection was made, but was not sustained by the court. The objection taken then, was that the schedule was not perfect, but allowed alterations and additions to be made to the schedules by the mutual consent of one of the parties to each part of the assignment.

The judge observed, "the trustee must be presumed to act honestly, and does, in fact, covenant with all the parties for a faithful performance of his duties. A clause reposing confidence in him in the discharge of his duties, can surely not be deemed fraudulent from that fact alone. If the trustee were notoriously insolvent, or of bad character, (which is not pretended here) such a clause might be deemed an auxiliary ground for presumptive fraud. But a power of this nature, simply because it may be abused, is not to be deemed unreasonable or fraudulent."

It is, I think, fairly inferable from this reasoning, that if the list of preferred creditors was not merely imperfect, but contained no statement of the extent of their claims, no doubt would have been entertained of its suspicious character, in an instrument requiring the creditors to accept terms and conditions.

It was further objected to the efficacy of the assignment, so far as

the attaching creditor was concerned, that no proof was given of the *bona fide* existence of the preferred debts. I am not prepared to say that this circumstance, of itself, would create any presumption against a deed otherwise fair; and it would seem to me proper that some suspicion should first be cast upon the transaction, by the party seeking to overturn it, before the persons claiming under the deed could be required to prove that the debts set forth were genuine and *bona fide*. A majority of the court, however, entertain a different opinion on this point, and think such proof always necessary to establish the deed in opposition to the claims of an attaching creditor. (5 Mo. R. 485, 463.)

The only remaining objection to this deed is, that the trust created by it, after paying the preferred creditors, and those who agree to release, is for the benefit of the grantors, and not for the other creditors generally. This objection seems to be resolvable into the first and principle urged to the whole instrument, the requisition of releases. If the deed containing a stipulation for releases, were valid, the trust avowed on its face, that the remainder should return to the assignors, would amount to no more than the law itself would create. *Brashear v. West*, (7 Peters R. 608.) It would only make the delay greater, but would certainly not protect the property from the process of the courts. For the law would also declare, that after reverting to the assignors, it would be a mere trust in their hands for the benefit of the unpaid creditors. This objection, therefore, forms a part of the first objection, and is so viewed by this court.

The judgment of the circuit court is reversed, and the cause remanded.

Circuit Court of the United States, Massachusetts, May Term, 1840, at Boston.

FOSTER v. HILLIARD AND ANOTHER, EXECUTORS.

Where a sale of real estate is jointly made by persons, having independent interests, the necessary conclusion, in the absence of all other countervailing circumstances, is, that they are to share the purchase money according to their respective interests.

In the case of a tenant for life, remainder in fee, of lands under mortgage, the parties contribute to the discharge of the incumbrance according to the relative value of their respective interests, calculated according to the value of the estate of the tenant for life by the common tables.

Certain real estate was devised to A. for life, remainder to certain minors in fee. A., with the consent of the guardian of the minors, sold the land, but died before receiving the whole of the purchase money, and the residue was received by his executors:

Held, that the rights of the parties were absolutely fixed *at the very time of the sale*, and that the executors of the deceased and the remainder men were entitled to share in the proceeds, according to the interests of A., and the remainder men at that time.

Held, also, that the interest of the tenant for life was to be determined not by the time when he actually died, but by the value of his life as ascertained by the common tables at the time of the sale. And although he died within four years from the time of the sale, yet his interest was to be calculated for about twenty years, as that was the duration of his life as ascertained by the common tables.

THIS was an action of assumpsit, and came before the court upon an agreed statement of facts in substance as follows:—A devise was made by Thomas Foster of certain wild and uncultivated lands in Maine, to John Foster as tenant for life, remainder to his nephews, Andrew, Samuel C., James, and George Foster, then minors, under the guardianship of Mary Foster, their mother. In 1832, after the death of the testator, the tenant for life and the guardian of the remainder men, then still under age, sold the land, and the tenant for life received a part of the purchase money, and took from the purchaser a deed of mortgage of the same land, in his own name, to secure certain notes, made payable to him or his order, which were given for the balance of the purchase money, and certain other moneys due from the purchaser to him. Soon after the sale, the tenant for life brought a bill in equity, and obtained an injunction against the purchaser to restrain him from committing waste on the mortgaged premises, and incurred great expenses in prosecuting this suit, and in other legal procedures in the collection of said notes. The tenant for life, after receiving sundry sums of money on account of the mortgage and other securities, sold and assigned the same, and took in payment therefor, other notes and securities, in like manner made payable to his order, and a sum in money, and subsequently died. After his death, his executors sold the last mentioned notes and securities, and received payment therefor in money. The tenant for life, while he lived, had the possession, control, and entire use of the money and the securities and notes given in payment for said land, and the moneys and interest paid thereon; and neither the guardian or the remainder men exercised or asserted any right of supervision, or interferred in any way, in the management and use of said property by the tenant for life; nor were they knowing to, or ever consulted in reference to said legal procedures, or the transfers, sales, and investments made by the tenant for life or his executors, or any matter or thing concerning the property in his hands.

John Foster died November 1, 1836, aged 54 years, 3 months, and 27 days; having been born July 4, 1782. At the time of the sale, November 14, 1832, his age was 50 years, 9 months, and 10 days, and at that time his expectancy of life, by Wigglesworth's tables was 20 $\frac{28}{100}$ years; by the Carlisle tables, used at the life office in Boston, it was a fraction greater. The executors were requested to pay over to the devisees in remainder, the whole capital sum, retaining only the interest, as belonging to John Foster; and they offered to pay only that portion of it which would result from a calculation of the value of John's life estate, supposing the land to be turned into cash on the day of sale, and the money divided on that day, according to the rules for calculating the value of annuities.

The case was submitted to the court upon the agreed statement of facts, with liberty to infer such facts as a jury would be authorized to infer.

Dehon for the plaintiff,

Greenleaf for the defendant.

STORY J. The case may be shortly stated, upon which the arguments have been addressed to the court. A devise was made of certain wild and uncultivated lands in Maine, to A. as tenant for life, remainder to his nephews, who were minors, in fee. After the death of the testator the tenant for life, with the assent of the guardian of the minors, sold the land, and received a part of the purchase money, and then died, and the residue of the purchase money has since been received by the executors of the tenant for life. The minors have since come of age; and do not seek to disturb the sale; but claim the whole purchase money from the executors. The present action is brought by one of the remainder men to recover his share. There is no proof of any agreement between the tenant for life and the guardian as to the distribution or division of the purchase money between the tenant for life and the remainder men.

On behalf of the remainder men, it is contended, 1. That the purchase money is to be treated as a mere substitute for the land on the sale, and that the tenant for life was entitled to the income thereof during his life, and that the whole principal now belongs to them. 2. That if they are not so entitled, the apportionment of the purchase money is to be made between them and the executors, not according to the value of the life estate of the tenant for life according to the common annuity and life tables, but according to the actual facts, he having died shortly after the sale. On the other hand, the executors contend, 1. That the tenant for life was entitled, and they, as his executors, are entitled to hold so much of the purchase money as the value of his life estate at the time of the sale bore to the whole interest in fee. 2. That the apportionment between them is to be made according to the value calculated by the common annuity life tables, at the time of the sale without any reference to the actual duration of his life.

It is admitted, that there is no case exactly in point; and, perhaps, considering the frequency of sales by a tenant for life and a remainder man, it is a matter of some surprise, that no such case should be found. The circumstance, however, may be reasonably accounted for, either upon the ground, that the sale usually takes place upon distinct and independent bargains, or where there is a joint bargain, the shares of the respective parties are usually ascertained and apportioned by some private agreement. Here no such agreement can be traced; and the sale seems to have proceeded upon a mutual confidence, that the proceeds would ultimately be divided justly and equitably between the parties according to their respective rights.

What are those rights? It seems to me, that when a sale of real

estate is jointly made by two or more persons having independent interests, the natural, nay, the necessary conclusion in the absence of all other countervailing circumstances, is, that they are to share the purchase money according to their respective interests. If three tenants in common should jointly sell an estate, they would certainly share the purchase money according to their respective individual interests. If one held a moiety and the others one quarter part cash, they would share in the like proportions. So, if three partners should sell an estate they would all share equally in the purchase money. What difference can it make, whether they have undivided interests in the fee, or separate interests carved in succession out of the fee? Whether they are tenants in common of the fee, or tenants for life and remainder men in fee? In contemplation of law, in each case, the sale is a sale of distinct and independent interests; and if the parties do not fix the amount of their respective shares in the purchase money by some positive agreement, the natural conclusion is, not that any one of them surrenders his rights to the other; but that they silently agree to apportion the same among themselves, according to their respective rights. Now, if in the present case the tenant for life had separately sold his life interest to the purchaser, there is no pretence to say, that he would not have been solely entitled to the principal of the purchase money. What difference can it make, except as to the means of ascertaining the value of his life estate, that he proceeds to make a sale, or joins in a sale of the remainder in fee? It does not strike me, that there is any. Suppose A. and B., the several owners of two adjoining acres of land, should unite and sell them both in one deed, to a purchaser, for a gross consideration, would not the purchase money be divisible between them according to the relative value of the two acres? I think it clearly would.

But it is said, that upon the sale, the purchase money was substituted for the land, and it is therefore to be treated exactly, as if the land had remained in the parties; and hence, that the tenant for life had an interest for life in the purchase money, that is, in its income, and the remainder in fee in the whole principal belonged to the remainder men, the present claimants. Now, this is assuming the very point in controversy; it is stating the difficulty, and not solving it. When a sale is made, the ordinary result is, that the vendor is entitled to the purchase money itself, and not merely to the income thereof. If a different apportionment takes place, it is a matter of private agreement, and not an inference of law. If (as I have already suggested) a tenant for life of land sells his life estate, he has a title to the whole purchase money, and not merely to the income thereof. He sells his own estate, and he is entitled to its full value at the time of the sale.

Then, how stands the law in cases bearing a close analogy? Suppose the case of a tenant for life, remainder in fee, of lands under mortgage; in what manner do the parties contribute to the discharge of the incumbrance? Exactly, as we all know, according to the relative value of their respective interests in the land, calculated according to the

value of the estate of the tenant for life by the common tables. I need not cite authorities to this point; they are familiar to the profession.[1] The rule is founded upon the obvious equity, that every one of the parties in interest should contribute in proportion to the benefit he derives from the discharge of the incumbrance. The same principle applies to the case of a sale. Each party is to participate in the purchase money in proportion to the beneficial interest he has in the land. The same principle applies, where a mortgagee devises the mortgaged estate to one for life, remainder over in fee; the tenant for life and the remainder man share the mortgage money paid by the mortgagor during their lives according to the value of their respective interests at the time of the payment.[2] This was indirectly admitted in *Brent v. Brent*, (1 Vern. 69); and directly held in *Thynn v. Duvall*, (2 Vern. R. 117.) That is certainly a case nearly approaching the present, where it might have been said, that the devisee for life of the mortgagee ought to be entitled only to the interest for life, and to no part of the principal. A doctrine somewhat different was asserted in the case of *Lord Penrhyn v. Hughes*, (5 Ves. 99, 107), where the master of the rolls said, that where there is a tenant for life and remainder men, entitled to an estate under incumbrances, the tenant for life and the incumbrancers have a right to have the estate sold to discharge the incumbrances, and the surplus of money after discharging the incumbrances is to be divided between the parties in the proportion that their interests bear to the estate; that is, as the master of the rolls afterwards explained, by putting the whole out at interest, and allowing the tenant the interest for his life.[3] It is not, perhaps, very easy to see the reason of this particular doctrine. It may be, that the tenant for life shall not by his own act compel the remainder man to submit to a sale, by which his interest in the remainder may be materially affected without his consent. But that case is unlike the present, where there is a voluntary joinder in the sale, or a confirmation of it. A court of equity may well decline to interfere, *in adversum*, to change real estate, by a sale, into personal estate, without imposing conditions, by which the proceeds should have, throughout, the character of the original fund when it would not act in the same manner where there had been a voluntary sale by the parties. The distinction is often acted on in courts of equity.[4] In the case of *Houghton v. Hapgood*, (13 Pick. R. 154) as far as I am able to gather from the report, which, on this point, may be thought somewhat indeterminate, a tenant by the curtesy of his wife's estate, sold by an executor improperly, but

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[1] See Story's Eq. Jurisp. s. 487, where many of the authorities are collected. 1 Powell on Mort. by Coventry & Rand, 312, note M. Id. 314, a. note Q. 2 Powell on Mort. by the same, p. 920, p. 923, note H. Id. 1043, note O.

[2] See 1 Story's Eq. Jurisp. s. 485, and note. 3 Powell on Mortg. by Coventry & Rand, p. 1043, note O.

[3] See *White v. White*, (9 Ves R. 554, S. C. 4 Ves. R. 33). 3 Powell on Mortg. 1043, note O.

[4] See 2 Story's Eq. Jurisp. s. 1357.

the sale whereof was afterwards confirmed both by himself and by her heirs, was held entitled to share in the proceeds, according to the value of his life estate, as tenant by the curtesy, calculated by the common tables of life annuities. If I take a right view of that case, it is in exact coincidence with the opinion, which I hold in the present case.

It appears to me, that the sale in the present case having been confirmed, and adopted by all the parties in interest, must be treated in the same way and manner, and have the same effect, as if it had been made by the consent of all the parties in interest, and all of them were then competent to make the sale ; and that the rights of all the parties were fixed at that time.

And this leads me to say a few words on the second point made at the bar, as to the rule of apportionment. I think it must be according to the value of the life of the tenant for life, at the time of the sale, calculated according to the common tables. If I am right in the opinion already stated, that the rights of the parties were absolutely fixed at the very time of the sale, then it follows, as a necessary consequence, that they are entitled to share in the proceeds, according to the relative values of their respective interests in the estate, at the time of the sale. The case of *Clyatt v. Batteson*, (1 Vern. R. 404) is not opposed to this doctrine. In that case lands in mortgage were devised to A. for life, remainder to B. in fee. B. bought up the mortgage, taking an assignment thereof in the name of trustees. A. died ; and then B, the remainder man, brought a suit against the defendant, who was the representative of A., to redeem the mortgage, and insisted, that the representative ought to pay one third of the mortgage money paid by B., by reason, that A. enjoyed the profits during his life. The court held, that if B. had brought the bill in A.'s lifetime, he would have been entitled to the proportion of the money with respect to the value of the respective estates of the tenant for life and the remainder man, (that is, according to the old rule, now exploded, one third ;) but that A. being dead, and having enjoyed the estate but one year only, the representative was bound only to allow for the time A. enjoyed the estate. This decision turned, therefore, upon the very point of the value of the estates of the tenant for life and the remainder man, at the time when the parties were fixed with the payment of the money. But when a tenant for life sells his life estate, he sells it for what it is now worth, and of course his share of the purchase money does not depend upon the future events of his life or death, but upon its present value. It strikes me, therefore, that the true rule in the present case, is to apportion the purchase money between the tenant for life and the remainder men, according to the relative values of their respective estates in the land at the time of the sale, unaffected by the subsequent events. It is said, that the duration of the life of the tenant for life, calculated according to the common tables, was over twenty years, whereas he died at a little less than four years after the sale. Be it so. The event has turned out unfavorably for the remainder men—as contingent events sometimes do. But the

tenant for life might have lived thirty years, and then the apportionment would have been favorable to them. The act, therefore, does not shake the propriety of the rule of apportionment; but it only shows, that it has the common elements of uncertainty belonging to all calculations of contingencies. A tenant for life of a mortgaged estate may die within a year after he has been compelled to pay one third part of the mortgage money upon a decree of redemption, his life having been calculated as worth that proportion of the money. He may on the other hand live far beyond the period of average life. Yet this irregularity has never been supposed to justify any departure from the general rule of contribution.

In the view, which I take of the case, the other points made at the bar are not material to be discussed. I think, that the remainder men are entitled to their proportion of the purchase money according to the relative value of the life estate, and the remainder at the time of the sale; that the executors are liable for this amount to the remainder men; and that upon so much of it as either the tenant for life or the executors have received interest, they are entitled to receive their proportionate share of the interest.

District Court of the United States, Massachusetts, June Term, 1840, *at Boston.*

BENNETT v. SHERMAN.

Case of a libel by a seaman on board a whaling ship, against the captain, for an assault, in causing him to be seized up and flogged. The court refused, under the circumstances of the case, to make a decree of damages in favor of the libellant.

THIS was the case of a libel for an assault. The libellant was a seaman on board the ship Mount Vernon, of New Bedford, of which E. S. Sherman was master, in a whaling voyage, commencing in November, 1837, and which was finished by the arrival of said ship at New Bedford, in the month of March last.

The libellant alleged, that in the month of May, 1838, on the high seas, while he was in the forecastle, at dinner time, one of the crew, *James Rayner*, found fault with some of the food, "as not being fit for a man to eat," but put it into the libellant's dish, who then said, "you say yourself, that this is not fit for a man to eat, why do you put it into my dish"; that thereupon, one John Collins, one of the seamen of the ship, said, "*it was good enough for a Frenchman*," and then *spit in the libellant's face several times*, calling him *a damned Frenchman*, with other opprobrious expressions; and coming behind the libellant, seized him by the throat, thereby causing an effusion of blood from his throat and nostrils. That the libellant went and com-

plained to Captain Sherman of the mal-treatment and abuse that he had received, who ordered the mate to seize the libellant up; that notwithstanding the libellant's remonstrances, Sherman insisted on the execution of his orders; that the libellant was accordingly seized up to the mizen rigging, and that the said Sherman, then and there inflicted on his back and neck, about two dozen lashes, with nine yarn rattling stuff, doubled, so as to make four parts or strands, for no cause, whatever; by which he suffered extreme pain; and for which he claimed damages in the sum of 100 dollars.

The respondent, in his answer, alleged, that on the first day after leaving New Bedford, on the voyage, he called all hands aft, and announced to them (the libellant being present, and hearing the same,) the rules and regulations, which he should require to be observed, for the maintenance of proper discipline on board said ship, and to promote the objects of the voyage; and, among other requirements, distinctly stated, that there must be no quarrelling or fighting on board the ship, and that a disobedience of that order would be severely punished; that this order, so important for the safety of the ship, and success of the voyage, was repeatedly promulgated to the crew, prior to the day in which the transaction stated by the libellant, occurred, and was peculiarly requisite, in relation to that ship and voyage, as the crew consisted of a large number of persons, strangers to each other, and to the officers, and of whose characters the officers had and could have no knowledge previous to the commencement of the voyage. That two of the crew having disobeyed that order, they were seized up in the usual manner for punishment, and the whole crew were called aft, the said Bennett among them, to witness the correction. But it being the first offence, and hoping for a beneficial effect from mild and gentle treatment, he remitted the threatened punishment on that occasion, ordering the men to their duty, and distinctly stating to Bennett and the rest of the crew, that for the next similar invasion of that order, he should certainly punish the offenders. That in the instance in reference to which the libellant complained, the said Bennett came upon deck with his face scratched, and bloody, and complained to the respondent, that John Collins had been fighting him; representing, that he (the said libellant,) had not been at all to blame. Whereupon said Collins was ordered aft, and the whole crew were summoned to witness his punishment; that the said Collins was then, "in the presence of the crew, seized up, and corrected *in a proper manner.*" that it was then stated to the respondent, by several of the crew, that said Bennett was more to blame than the said Collins, that he had dared the said Collins out to fight, and commenced the affray, that thereupon the respondent made particular and deliberate inquiry of the crew individually, who witnessed the quarrel, and they severally, and without exception, informed him, that Bennett commenced the fight, and was most deserving of punishment; that thereupon, he ordered him to be seized up, and in the presence of the crew, administered to him a mild and proper correction, giving him not exceeding eight

blows, on his back ; the said Bennett then having on a pair of woollen trowsers, a woollen jacket, and woollen shirt ; the instrument used being made of seizing stuff, consisting of four tails. That this was the whole extent of the punishment received by said Bennett ; that no blood was let, and no marks made upon his person. That his clothes were not taken off, or let down ; and that he made no complaint of the punishment. The respondent concluded, by emphatic averment, that his treatment of said Bennett, and of all the ship's company, during the whole of the voyage, was kind and paternal, without any infliction of punishment in a state of angry feeling, and never for any other purpose than for the preservation of discipline, and such as was necessary to secure the welfare and comfort of his ship's company, and the safety of the property committed to his charge, and that from interchange between himself and the libellant, after the said punishment, during said voyage, and since their return to New Bedford, he has good cause to believe, and does believe that this prosecution has been stimulated by some other person, and not upon the motion of said Bennett himself.

The evidence in the case, was from the testimony of Samuel Farmer, one of the crew, produced on the part of the libellant ; and for the respondent, the deposition of Humphrey A. Shelley, the mate, and the testimony of George A. Coville, boat steerer, David Miller, second mate, and Joseph Enos, boat steerer, witnesses examined on the stand.

Samuel Farmer, the witness, produced on the part of the libellant, had his berth in the steerage, and was not with the men in the forecastle, and his testimony respecting the affray, was altogether derived from what was related by the libellant, when he made his complaint to Captain Sherman, and from what was said by Collins when called up for punishment. His repetition of what was stated by the libellant, on that occasion, corresponded in the main with the statement in the libel, with this addition, that to Collins's reproachful remark, the libellant replied, that *a Frenchman was as good as he ;* and that immediately thereupon, the libellant was seized by the throat by Collins, and severely handled, as stated in the libel. He farther testified, that when the respondent's determination to chastise the libellant was announced, the mate, Mr Shelley, interposed in his behalf, and said he ought not to be flogged, adding, that Collins was an impudent, saucy fellow, a man who would impose on a Frenchman. J. Collins, he says, received four dozen blows, and the libellant, two dozen, inflicted by the captain, with all his strength ; and that said libellant's clothing, when he received the blows, was a cotton shirt and trowsers, without a jacket.

The mate's deposition sustained the captain's statement. He contradicted the testimony of Farmer, representing him as expressing to Captain Sherman, that the libellant was innocent, and Collins the sole offender in the affray. After the punishment of Collins, Captain Sherman, he says, was going to let Bennett go unpunished ; " but all

the crew, and those that saw the fight, in the forecastle, said, that Bennett was most to blame, and ought to be flogged." That, thereupon, Bennett was seized up, and received from the captain, six or eight blows, with a piece of worming stuff about twice as large as a cod line.

George A. Coville, (boat steerer,) confirmed the mate's statement as to the circumstances relative to the punishment inflicted by Captain Sherman, on those two men. Collins, he said, received twenty four blows, and Bennett, seven or eight. With this, the testimony of Miller, second mate, corresponded. These two witnesses, and also, Enos, (a boat steerer,) all confirmed the mate's testimony, as to the declaration made by the crew, when it appeared that the captain was about to dismiss the libellant, unpunished.—There was a collision of testimony in three particulars. The opinion said to have been pronounced by the mate, of the libellant's entire innocence. The number of blows received by the libellant, and his clothing, at the time. In regard to the first particular, it was mentioned only by Farmer ; and Miller said, that he and the mate stood together, at the time, and that no such objection was made by that officer, to the punishment of Bennett, and it was expressly and repeatedly denied by the mate, when closely questioned on that point.

As to the number of blows, the libellant alleged, that he received two dozen ; so said Farmer. In this they are contradicted by four witnesses, all present on that occasion. As to the libellant's clothing, at the time, it was not described in his statement. Farmer said, that he had on a cotton shirt and trowsers. All the other witnesses agreed that he was clothed in a woollen shirt and trowsers, or pantaloons. One only, Miller, mentioned a jacket in addition.

The case was argued on the evidence by ***E. Bassett*** for the libellant, and by ***Clifford*** for the respondent.

Davis J. If it were necessary for a satisfactory decision in this case, to ascertain, precisely, in what particular, and in what manner, or degree the libellant was to blame, in the affray at dinner, in the forecastle, I should find it difficult to come to a conclusion. It altogether rests on the libellant's declarations ; none of the men, who were in the forecastle at said time, are produced as witnesses. My inference from all that appears in the case, is, that the impression under which Captain Sherman proceeded, when he commenced the punishment of Collins, was reasonable and discreet. Of the severity of that punishment, it would be out of place, in this case, to express an opinion. It is sufficient to say, that I conclude from the degree of that punishment, that Captain Sherman proceeded with a persuasion that Collins was the sole offender, and that Bennett should go unpunished. He was led to depart from that favorable consideration, in reference to Bennett, by the united declarations of the men who were called to witness the punishment. Influenced by these declarations, and, as there is reason to believe, purely influenced by considerations of prudent regard to the maintenance of peace and quietness among

the ship's crew, and the advancement of the interests entrusted to his care and direction ; he inflicted punishment on the libellant not with severity, not exceeding eight blows, and with an instrument which has been exhibited, and the manner of using it described ; and which I cannot pronounce an unlawful or improper one, for occasions requiring chastisement on board a ship at sea. It was said in the argument for the libellant, that Captain Sherman should not have so suddenly reversed his favorable determination, respecting Bennett, by those declarations made by the crew. His decision does not appear to have been made immediately on the general expression of the crew, that the libellant was in fault. He avers that he made deliberate and particular inquiry of the crew, individually, who witnessed the quarrel. This is corroborated by the mate's testimony, who mentions the names of four or five of the men, who declared that the libellant was to blame, in the affray. It was argued that the punishment should have been suspended until the facts of the case were more particularly and deliberately inquired into. I should doubt, whether any action in reference to the libellant's culpability, would have been less severe, if founded on such examination. It is not probable that those men would have retracted the declaration which they had made, in the presence of the whole ship's company, officers and crew. Captain Sherman's prompt decision on the subject, his motives being just and laudable, should not, I think, under the circumstances of the case, be visited with a decree of damages. Besides the declaration of the crew, which it would have been imprudent and unsafe, entirely to disregard, he might very properly consider, that in such affrays, it is seldom that either of the parties is entirely free from fault, and that among a ship's company, it is not an usual thing, or to be expected, that men should insist on corporal punishment of one of their number. Captain Sherman's situation was perplexing, and if, in his decision, he made a mistake, it was not in anger, from ill will, or any unworthy disposition or motives in reference to the libellant. The punishment was slight in the number of blows, and as appears probable in the degree of force which was applied. A different course, considering the united representations of the crew, who witnessed the affray, and with disregard to their declarations, might have occasioned deep umbrage, and have been disastrous or injurious to the voyage.

The closing allegation, or expression of belief in the respondent's answer, has no influence in the decision, and had better have been omitted. Seamen, when beaten or injured, or supposing themselves injured by an officer, frequently utter expressions of deep resentment, and threaten what they will do at home, when the voyage shall be finished. All this is of no use, and does not improve their condition. Bennett's deportment and actions on the subject, after the usage of which he now complains, should not be interpreted to his disadvantage. As to the supposed instigation of a suit, suggested not to have been originally intended by the libellant, it is a common remark in such cases, sometimes suggested in argument, at the hearing, but sel-

dom, if ever, included in the answer. The court might be misled, and engage in a useless inquiry, by entering into an examination of the truth of such suggestions. Extraneous influences, producing suits of this description, are often imagined, and sometimes doubtless, existing, may be the effect of generous sympathy, and, in the official organs, should be viewed, as a portion of decided duty in their profession.

Supreme Court of Pennsylvania, May Term, 1840.

HARRISBURG BANK v. CROFT & OTHERS.

It seems, that on principles of general equity, a joint surety who has paid the debt, is entitled to have the security assigned to him, in order to have the benefit of it against his co-sureties.

But however that may be, where there is access to a separate administration of equity through chancery forms, such an assignment is indispensable to justice in a court which administers equity through common law forms.

IN the court below, this was a question of substitution which arose out of the following facts.

On the fourteenth of May, 1830, John D. Mahon drew a promissory note in favor of the defendants for 900 dollars, payable in four months at the Harrisburg Bank, by which it was discounted; and judgment was obtained on it in November, 1831, against the defendants, the indorsers. Execution issued to August term, 1838, and the amount was paid, equally by Galbraith and Moore; whereupon Moore obtained a rule upon Croft to show cause why he should not be substituted in place of the Bank for the amount paid by him for Croft, whose personal property it was admitted, had been sold on other executions. It appeared when the rule came on to be heard, that Moore had received the proceeds of the discount on the check of his fellow indorsers; but it also appeared that Mahon, for whom the note was discounted, had procured him to charge himself in his account with a firm of which all the parties were members, with a balance due on his stock account by Mahon to the same firm, which it was the object of the discount to discharge. The rule was made absolute and the judgment marked to Moore's use.

The cause was argued here by *Biddle* and *Watts* for Croft; who relied on 6 Paige R. 32; 2 Pennsylv. 361; 3 Pennsylv. 405; 1 Law Lib. 143; id. 266, Fell on Guaranty, 199; 2 Ves. Jr. 540; and by *Graham* and *Alexander* for Moore; who relied on 5 Watts 219; 1 Johns Ch. 409; Atk. 434; 4 Johns Ch. 545; 1 Pennsylv. 395; American Jurist, No. 41, page 192; 6 Paige R. 30.

GIBSON C. J. delivered the opinion of the court. As a remedy between surety and principal, or between sureties themselves, subrogation to the ownership of the security has advantages which must incline courts of equity to favour it. As each is separately liable at law

for no more than an aliquot part to him who has paid the whole (*Colwell v. Edwards*, & 2 Bos. P. 268) an action for contribution has this disadvantage that it leaves him who has paid more than his proportion to bear the whole burthen, where it occurs, of the insolvency of particular contributors. Besides, as was remarked in *Craythorne v. Swinburne*, (14 Ves. 164) separate actions, where the contributors are numerous, must be attended with many difficulties. All this may be avoided by substituting the surety who has paid, for the original creditor; and by means of the control which the ownership of the security gives him, enables him to apply it, under the supervision of the court, as the creditor himself might have done, so as to apportion the loss among all. To this an objection is made by Mr Justice Story, (1 Eq. Jurisp. 472, note 2) who, on the authority of *Gammon v. Stone*, (1 Ves. 339) and *Woffington v. Sparks*, (2 Ves. 569) contests the opinion of Chancellor Kent in *Cheesebrough v. Millard*, (1 Johns Ch. R. 413) and *Avery v. Petten*, (7 Johns Ch. R. 211) that a surety who has paid the debt is entitled to an *assignment* of the security against his principal or co-surety. The Chancellor relied on *Morgan v. Seymour*, (1 Ch. R. 150—3d ed. 64) and *Ex parte Crisp*, (1 Ach. 135) in which the point was directly adjudged; to which he would doubtless have added *Glassop v. Harrison*, (Cooper 61) had the decision in it been known in this country at the time. It was made known however only a few months before. In that case, the surety of a receiver of the Opera House who had advanced money to his principal, which the principal had paid to the tradesmen of the house instead of the bankers of the trustees who ought to have received it, was let in on a balance due to the receiver on the settlement of his account. Now though there was no actual assignment of the tradesmen's bills it was only by being put in their place and not that of the receiver that the surety could be relieved; for as the receiver had previously assigned the fund away, to have put the surety in his place, would have done nothing; and had the tradesmen's bills been extinguished in equity, as well as at law, to have put in the place even of the tradesmen, would have done as little. Now the ground of objection in the two cases in the elder Vesey was, that as the principal might plead the payment in bar, an assignment of the exploded security would be nugatory. But this case very clearly proves that what is payment at law may not be payment in equity. *Parsons v. Briddock* (2 Vern. 608) also seems to support the opinion of Chancellor Kent. In that case, sureties who had paid the debt, on being separately sued, had an assignment of a judgment obtained against special bail of the principal who also had been separately sued, on the ground that the special bail stood in the place of their principal. Now though the original bond was joint and several, yet payment of his several bond by the surety, would at law discharge also the several bond of his principal; and the same objection would lie to an assignment of it, that was made in the two cases in Vesey. It is no answer to say that as the bond was sued severally, the judgment against the co-obligor's bail was collateral; and that it is

not disputed that a surety is entitled to all his principal's securities of that stamp. It is indeed asserted by Mr Theobald (Principal and Surety, 259) but on what modern authority I know not, that "it is *now* held that sureties are entitled to stand in the place of the creditor, and to have the same remedies as he would have had, *only* in respect of *collateral* securities ; and that the payment of a specially debt by the surety, makes him only a simple contract creditor," an assertion incompatable with what he had said in the beginning of the same chapter, that "a surety is entitled to *every* remedy which the creditor has against the principal debtor"—a remark of counsel erroneously attributed by him to the lord chancellor, which bears so directly on the point at issue, as to have induced Mr Justice Story to strip it of its pseudo judicial authority. The question then may yet be considered as an unsettled one whenever there is a formal administration of equity, though it must be admitted that the weight of authority inclines strongly in favour of the position assumed by Chancellor Kent. Nor can it be disputed that the reason given for the two decisions in Vesey, is more technical than solid. If, as is proved by *Parsons v. Briddock* and *Glossop v. Harrison*, what is payment at law may still not be payment in equity, it is inconceivable that the same power which prevents a plaintiff from suing at law for an inequitable demand, may not prevent a defendant also from setting up an inequitable defence. The only plausible reason for such a doctrine, is the one given by Mr Justice Story, that where the parties are all before the court, the chancellor may as well do justice to them at once by a direct decree. But whatever may be the foundation of the doctrine of assignment elsewhere, it is certain that we are indebted to it exclusively for our jurisdiction in matters of subrogation. An assignment may be unnecessary where the parties are before a court of plenary powers ; but in our own state the scantiness of our equitable apparatus compels us to administer equity in a great degree through common law forms ; and in a case of this kind, to attain the ends of justice indirectly through the instrumentality of an imaginary assignment of the security, which enables the surety to apply it by direction of the court, so as to cast a due share of the burthen on those who ought to bear it. The leading case with us, is *Kuhn v. North*, (10 Serg. & R. 399) in which it was held that payment by a surety with *intent* to discharge the judgment, will extinguish it both in equity and at law-; but that where the money is advanced to obtain the control of it, equity keeps it afoot to answer the end of the payment—a distinction whose value, as the motive of the surety can be important only in cases of voluntary payment, is not very appreciable. The general principle has been re-asserted however in *Faming v. Beaver*, (2 Rawle 132) *Burns v. Huntington Bank*, (1 Pennsyl. 398) and *Mahaff v. Shore*, (3 Pennsyl. 378,) in Pennsylvania therefore, however it may be elsewhere, the question is at rest.

Now it is clear in the proofs in the case under consideration, that the note was discounted for account of the drawer to make up the amount of stock he had agreed to bring into the partnership ; and though

the proceeds of it were, in the first instance received by the surety who claims to be substituted, it is equally clear at the drawers request, he charged himself with the drawers deficit in his stock account with the firm ; and that he, with one of his fellow endorsers paid the debt to the bank. We have then the ordinary case of payment by a co-surety ; and the court below properly directed him to be substituted for the creditor.

Order of subrogation affirmed.

SEIBERT v. EXECUTORS OF BUTZ, TO THE USE OF LONG.

A limitation over of a bequest of personal estate in these words, is not on a contingency too remote : "Should any one of my daughters die without issue, or without a will, then her inheritance is to go to my yet living daughters, in equal shares, or to their bodily heirs, in equal shares ; but that it may not be misunderstood, the sister's share to her children."

A recovery back by the executors, to the use of one of the surviving sisters, cannot be pleaded in bar to an action to recover back the part of another.

THIS action was brought by the plaintiffs below, in the common pleas of Berks county, to recover back a surviving sister's share of a fourth part of 10,412 dollars, bequeathed to the defendant's wife, and her three sisters, with a limitation over, of which, the will having been written in the German language, the following is a translation: "Should any one of my daughters die without heirs, (issue) or without a will, (then) her inheritance is to go to my yet living daughters in equal shares, or to their bodily heirs, in equal shares ; but that it may not be misunderstood, the sister's share to her children." It was admitted that one of the sisters had been married to the defendant ; that the principal sum was paid to them and their husbands ; and that the defendant's wife subsequently died without issue, and intestate, or without having made any appointment. The defendant proved that the plaintiffs had already recovered of him the share of another of the sisters ; and thence insisted that as the legacy to his wife had been given as a gross sum, it could not be recovered back in separate actions for particular parts of it, and consequently that the preceding action is a bar to all others : second, that the contingency in the limitation over, is too remote. The judge who tried the cause, directed a verdict for the plaintiffs, and the defendant brought a writ of error.

Smith for the plaintiff in error, cited 2 Atk. 308 ; 6 Serg. & R. 57 ; id. 461 ; 6 Watts, 96 ; id. 320 ; id. 309 ; 4 Serg. & R. 246 ; 9 Serg. & R. 429 ; 15 Serg. & R. 145 ; 17 Serg. & R. 319 ; 2 Stra. 1259 ; 5 Serg. & R. 409.

Gibon, contra, cited 14 Serg. & R. 301.

PER CURIAM, GIBSON C. J. An action to recover a legacy, being a substitute for a bill in equity, is to be so managed as to take effect without hindrance from common law technicalities. It is immaterial to the beneficial plaintiff, who was neither an actual nor a po-

tential party, to the former suit, that the legal plaintiffs separately recovered another sister's share of the bequest over ; and the only question deserving of consideration, is, whether the contingency is not too remote ; and there is one circumstance indicative of intention which shows very clearly that it is not. The contingency is one with a double aspect—death without issue, or without a will—which must necessarily have happened at the death of the first, taken in one of two ways. The legacy was then to take a determinate direction for the future, either by the will of the father, or the will of the daughter. The will of the daughter would speak at her death, and the contingency of dying without issue, was evidently so closely coupled with it in the testator's apprehension, as to have been inseparable from it ; and though there may be an indefinite dying, without issue, there can be no indefinite dying, without a will. The legacy was to go to the survivors, if the dying sister made no will, and had no children ; but if she made a will, even perhaps in the nature of an appointment, it was to go to her appointee : but to either, necessarily at her death. There is, perhaps, no case in which the limitation over of personal estate after an indefinite dying without issue, whether the first limitation were indefinite, or expressly for life, has *ex vi termini*, been confined to a dying without issue, at the time of the death ; but the courts have seized with avidity, upon any circumstance, however trivial, denoting an intent to fix the contingency at that period. Here it is impossible to doubt of an intention to give the dying sister's share over, should she not have given it to some one else ; and in this respect, the case is much stronger than *Target v. Gaunt*, (1 P. W. 432,) though very like it, in which a testator devised to his son for life, and no longer, and after his decease, to such of the son's issue, as the son should, by will appoint ; and in case the son should die without issue, then over : on this will, the words were interpreted to mean issue living at the son's death, because such issue was intended by the use of that word, where it last occurred, as the son might have appointed the term to : consequently such issue was meant, as might have been living at his death. Here the intention is, to say the least, equally clear ; and the jury were properly instructed that the plaintiffs were entitled to recover.

Judgment affirmed.

Municipal Court of Boston, April Term, 1840, *at Boston.*

COMMONWEALTH v. STEARNS.

Embezzlement—where an auctioneer, being insolvent, knowingly and designedly appropriated to his own use, the proceeds of the sales of property, consigned to him, without the consent of the consignor.

IN a former report of this trial, (page 56, of the present volume,)

we detailed the principal facts as they appeared in evidence, and the points of counsel. It is a case of some novelty, and considerable importance, and we make the following extract from the able charge of the judge, who presided at the trial.

THACHER J, in committing the case to the jury, after giving a brief account of the evidence, and reading the provisions of the Revised Statutes, upon which the indictment was founded, proceeded as follows :

Embezzlement is, properly speaking, the appropriation of the property of another, by breach of trust, which always includes something criminal. Where one person trusts another with money or goods, and the debtor fails to pay according to contract, it is in one sense, a breach of trust. But it is always to be considered, whether the failure to pay, was intentional, or accidental ;—did it arise from accident, or from misfortune ;—was the failure to pay consistent with fair intentions. In either of these views, it was not a criminal act ; nor is the debtor liable to be punished for it as such.

But if a person, by wrongful arts, and with intent to deceive, obtains the money, or property of another, and designedly wrongs the owner of the value, it is a fraudulent act, and comes under the description of embezzlement, or larceny, or cheating by false pretences, or by false tokens, according to the circumstances.

This being the law, the responsibility is upon the jury, to settle their belief of the facts proved in evidence, and to render a verdict which shall be compounded of both.

If having got this money into his hands, he knowingly and designedly applied it "*to his own use*," either to the payment of his debts, or the expenses of his business, or living ; it was a breach of trust reposed, and an act of embezzlement within the meaning and intent of the law. For by what right could he take the proceeds of property, entrusted to him to sell at auction, for cash, and on a promise of prompt payment over within three days after such sale, and then, instead thereof, to pay his own debts with the same, whether such debts were just, or otherwise. It was not accident, or misfortune, or inadvertence. The frequent applications to him for payment, almost daily, by Mr Gerry, and his clerk, preclude such excuse. He could not but have known, under the circumstances, that he did very wrong at the time : and if, with his eyes open, he thus offended against a plain law of the land, he must suffer the consequences of his guilt.

It has been contended in argument, that the transactions between Gerry and the defendant shew, that there was an actual sale of these cottons to the latter, and that it was not a consignment to sell at auction. If it was a sale of the goods on a credit of three days or for cash, then there was an actual transfer, and change of the property, and it was not within the statute of embezzlement. It was a question of fact to be settled by the jury. The defendant applied for a consignment of the cottons to sell at auction. Whether the bargain between him and Gerry, was hard, or not, he earnestly solicited it, and

never complained of it. He actually sold the goods at auction, and got the proceeds into his possession. It does not appear that he did not receive for them as much as he expected.

We must give to this law such construction, as will make it a living, vital principle of action, deserving the reverence and obedience of the whole community. If I have erred in matter of law, the defendant has his remedy, and can have the points reviewed under a bill of exceptions, by the supreme judicial court.

DIGEST OF ENGLISH CASES.

Selections from 6 Bingham's New Cases, parts 1, and 2, (Common Pleas); 8 Dowling's Practice Cases, part 1, (In all the courts); 2 Per. & Dav. part 4, (Queen's Bench.)

BILL OF EXCHANGE.

1. *Agent. Construction of Agreement.*—Defendants (merchants in *London,*) received orders from *G.* at *St. Petersburgh*, for a quantity of *Havana* sugars: that order was revoked, and another given for *Brazil* sugars, for the amount of which, defendants were to draw on plaintiff (*G.'s* agent at *Hamburgh,*) by a bill at three months: plaintiff accepted the bill; wrote to *G.* for instructions, because defendants had been accredited for *Havana* sugars, and not *Brazil*; and then to defendants to say that he had accepted the bill under their guaranty for the present, as he had not received the accreditive: *G.* then wrote to plaintiff, giving him credit for the *Brazil* sugar, and requesting him to release defendants from their guaranty: *G.* failed before the acceptance became due:—*Held*, that plaintiff was liable to defendants on this acceptance, notwithstanding defendants, after *G.'s* failure, wrote to plaintiff, "We have received from *G.* the assurance that he has arranged with you the needful for the protection of the draft; we reserve to ourselves any advantage from the insurance of the goods; if you have written to *G.* that you have not honored the draft, we cannot consider your acceptance as valid in any other way than on account of *G.*"—*Lohman v. Rougemont and another*, 6 Bing. N. C. 253.

2. *Failure of consideration. Judgment non obstante veredicto.*—To an action on a bill of exchange for 20*l.* 8*s.* 6*d.*, defendant pleaded that it was agreed between him and the plaintiff, that plaintiff should do certain carpenter's work for the sum of 63*l.*; that defendant paid to plaintiff 43*l.* on account of the work, and accepted the bill for the residue; that plaintiff neglected to do certain part of the work, and did other part in an unworkmanlike manner, and that the sum of 43*l.* paid on account was more than the value of the work done:—*Held*, that the plea was bad after verdict, as it did not shew a total failure of consideration for the bill. (*Solomon v. Turner*, 1 Stark. Rep 51.) *Priquet v. Larne*, 8 D. P. C. 176, Exch.

CASE.

1. *Allegation and proof of malice. Porter v. Weston*, 8 Scott, 25; S. C. 5 Bing. N. C. 715.

2. *As to the necessity of giving notice of intention to pull down a house.*

—The second count of the declaration stated that the plaintiffs were possessed of a vault, and of certain wine therein; that the defendant was about to pull down and remove, and did pull down and remove, certain other vaults and walls *next adjoining* the plaintiffs' vault; and thereupon it became and was the duty of the defendant, in the event of his not shoring up, or protecting the plaintiffs' vault, to give due and reasonable notice to the plaintiffs of his intention to pull down and remove the said vaults and walls so adjoining the plaintiffs' vault, before he pulled down the same, so as to enable the plaintiffs to protect themselves; and also to use due care and skill, and take due, reasonable, and proper precautions in and about the pulling down and removing his vaults and walls, so that for want of such care, skill, and precaution, the plaintiffs' vault and its contents might not be damaged or destroyed:—*Held*, that no duty was by law imposed upon the defendant, either to shore up the plaintiffs' vault, or to give them notice of his intention to pull down his own.

Held, also, that the using due care, skill, and precaution, in removing his own vaults and walls, so as to prevent injury resulting to the plaintiffs' vault from the absence of such care, skill, and precaution, was not a duty imposed in law on the defendant, in the absence of an allegation that he had notice of the existence and nature of the plaintiffs' vault.

General damages having been given upon the whole declaration:—*Held*, that the allegation as to the want of notice could not be rejected, and the damages ascribed to the rest of the declaration, even if good. (*Chadwick v. Trower*, in error, 8 Scott, 1; 6 Bing. N. C. 1.)

CONTRACT.

Legality of. Fraud. Peer. — By indenture between the defendants, who were shareholders in a projected railway, and the plaintiff, a peer of parliament, through whose estate the railway was to pass, it was stipulated on the one hand, that he should withdraw his opposition to a bill then before parliament, for making the railway according to a certain line, and, on the other hand, that they should apply, the next session, for a deviated line, and that, in case the bill then in parliament, should pass during the then present session, they would within six months after its passing, pay him 5000*l.* as compensation for the damage his estate would sustain by the deviated line, without prejudice to the further compensation to be paid him in the event of the deviated line not being adopted. To a declaration in debt for the 5000*l.*, alleging that the plaintiff had withdrawn his opposition, and that the bill had passed, &c., the defendants pleaded, 1. That they had abandoned the said deviated line, and had adopted, and were endeavoring to procure an act for another line, which would entirely avoid the plaintiff's estate. 2. That the agreement was made secretly, without the knowledge either of those, through whose lands the original line was to pass, or of the legislature, and was kept secret till the passing of the act, and that the plaintiff was a peer of parliament.

Held, on error in the Exchequer chamber—1. (reversing the judgment in Q. B. 2 Per. & Dev. 714.) that the agreement was not illegal, on the ground that it had been concealed from parliament, it not appearing on the face of the agreement itself, or from the averments of the second plea, that it was the intention of the parties, at the time of making it, to conceal the agreement. *Quære*, whether such an intention would have vitiated the agreement.

2. That for the same absence of intention, the concealment from the other land owners, did not vitiate the

agreement; and *semble*, that even if such intention had existed, it would not have vitiated the agreement, at least on the ground that it enabled the plaintiff to make a better bargain than other land owners.

Quære, whether such intention to conceal it from the land owners, would have vitiated the agreement on any other ground.

That it was competent to the plaintiff, though a peer of parliament, to make the agreement. *Lord Howden v. Simpson and others*, (2 P. & D. 731.[1])

INTELLIGENCE AND MISCELLANY.

TRIAL OF COURVOISIER—LICENSE OF COUNSEL.

The recent murder of Lord William Russell, by his servant, naturally caused a great excitement in England. The circumstances, too, were such as to envelope the whole affair in a mystery, which is not yet fairly cleared up; and the trial of Courvoisier, before Lord Chief Justice Tindal and Mr Baron Parke, at the old court, London on the 18th of June last, was one of the most remarkable, in many respects, of modern times. The evidence introduced by the crown made out but little more than a case of grave suspicion, and the prisoner would most probably have been acquitted, but for the appearance of a woman to whom he brought a package after the murder, with a request that she would keep it for him a short time; and which, on being opened, was found to contain several articles belonging to the deceased. Courvoisier was convicted and has since been executed. The cause of the murder is still somewhat doubtful, and the case belongs to that numerous class where the apparent absence of motive may be urged to a jury with much effect, in favor of innocence. The prisoner made several confessions, in which he admitted the crime, but gave different accounts of the motives which led him to the commission of it; neither of which seems to have been sufficiently strong to induce the commission of such a horrible offence. Not the least remarkable and exciting part of this trial was the fact, that the counsel of the prisoner, Mr C. Phillips, whose able and brilliant argument for his client must have made a deep impression, had the confession of Courvoisier in his pocket, all the while! When this fact came to be known, it seems to have caused a great deal of remark, and the duty of an advocate in such a case has been variously discussed in the English prints. Quite recently a statement was made in the *Globe*, to the effect, that the line of defence Mr Phillips intended to have taken, was, that the female servants had been engaged in criminal intrigue with some of the police, and had admitted them into the house for the purpose; and that the robbery and murder had been perpetrated by them. Upon this the *Examiner* remarks with great severity, insisting that the statement is too horrible to be credited, and says:

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1 See 1 Law Reporter, 35, for a report of this case when before the lord chancellor, August, 1837. See also the case of *Fuller v. Dame*, decided by the supreme judicial court, of Massachusetts, Suffolk, March Term, 1837, not yet reported.—[Ed.]

"Quite bad enough was Mr Phillips's defence as it was, yet, though condemned by the right sense of the public, it has had its advocates. In the most ingenious argument we have seen in vindication of it, the counsel is said to represent the prisoner with the advantages of the knowledge of the law and skill in sifting evidence, and giving due significance to facts; and it is therefore contended that it is the counsel's duty to act for the prisoner as the prisoner would act for himself if he had his advocate's skill. Admitting this position, it does not thence follow that it is the duty of the advocate to have recourse to falsehood in defence of his client; for the principle stated would only clothe the advocate with the rights and duties of the prisoner to lie for his own defence. Society cannot prevent his lying, the law must allow of his lying, it must yield him the opportunity of lying, if he chooses to lie; but the impossibility of preventing the lie, and the opportunity of the lie do not render the lie a right or a duty. How then can it be contended that the advocate, knowing his client's guilt and the circumstances of it, has a duty to uphold falsehood which does not belong to his client?

"We admit that there are grave objections to throwing up a brief. Cases not probable, but possible, may be imagined, in which a destroying weight of prejudice might be thrown upon an innocent client by such a step. A counsel might be moved by ill will or corruption to ruin a prisoner by throwing up his brief, and thereby implying that he had discovered the guilt of his client. An advocate might therefore feel bound by rule, even after a confession of guilt had been communicated to him, to go through a defence; but in this case we contend that the advocate should scrupulously refrain from any line of defence the effect of which would be to procure the acquittal of his client by criminating or destroying the characters of persons who had but borne true evidence against him. The defence should turn, in such case, on the sufficiency of the proof and on technical points, and not on the impugnment of honest evidence, or (worse still) on insinuations of guilt against the witnesses. The truth known to the advocate through the confession gives him the key to other truths, and clears evidence of suspicion which might have attached to it in his view before the knowledge of his client's guilt gave the right reading of circumstances."

This whole subject is one of considerable difficulty, and a misapprehension of it has done much to bring our profession into popular contempt. There is no better principle in our system of law, than that, which requires fidelity in counsellors to their clients, and which protects them in the exercise of it. So far from being a hindrance of justice, it is, in the long run, a most powerful aid in bringing about correct results in legal investigations; and those who take a different view of the subject, would seem to found their opinion upon a few isolated instances where public justice may have been defeated. If public opinion, in our profession, would sanction the conduct of an attorney in throwing up a brief in every case where he found it convenient, or for his interest to do so, or if he were permitted to disclose secrets, confided to him by his clients, it would be the cause of more injustice and oppression than ever has, or ever can result from the present system. Attorneys would then, indeed, have a tempting price of villany in all cases.

It is a very vulgar notion, also, that an attorney should necessarily abandon his client when he becomes convinced of his guilt. That he has no *right* to do this we take to be clear. Who made him the judge in the case? What right has he to decide the matter, and thus put all that has been intrusted to him at hazard? "From the moment," says Erskine, in his defence of Paine, "that any advocate can be permitted to say, that he will or will not stand be-

tween the crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or of the defence, he assumes the character of the judge; nay, he assumes it before the hour of the judgment; and, in proportion to his rank and reputation, puts the heavy influence of, perhaps a mistaken opinion, into the scale against the accused, in whose favor the benevolent principles of English law make all presumptions, and which command the very judge to be his counsel."

"But what do you think," said Mr Boswell to Dr Johnson, "of supporting a cause which you know to be bad?" Johnson: "Sir, you do not know it to be good or bad till the judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself, may convince the judge to whom you urge it; and, if it does not convince him, why, then, sir, you are wrong and he is right. It is his business to judge; and you are not to be confident in your opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion."

But even where the advocate knows from the confession of his client that he is guilty, his duty is not at an end. How often are confessions false! All lawyers are familiar with cases where innocent persons have confessed themselves guilty of crimes which they never committed. Besides, counsellors are in a measure public servants. They are bound to assist in seeing the *laws* executed. They are to watch, lest in any instance legal proceedings through haste, inadvertence, or any other cause, are improperly executed. They are to see, that the guilty be condemned, if at all, ACCORDING TO LAW. And this is the great advantage and protection of our system. For if the guilty are one day punished summarily and not according to law, the innocent may suffer the next. It is this constant watchfulness, prompted by self interest, which makes our criminal laws a terror only to evil doers.[1]

At the same time, it must be confessed, that in cases where the counsellor becomes doubtful whether his client's cause is good, or is satisfied it is bad, great caution is requisite lest he merge the man in the lawyer, and overstep the bounds within which both conscience and justice should restrain him. The proper limit it is always difficult to ascertain, and sometimes very much so, particularly where, as with us, the advocate comes into immediate contact with his client.

To maintain his true position is undoubtedly often the most difficult labor the lawyer has to encounter. The consideration of it has driven many high minded men from our ranks; and the opportunity the profession affords of separating professional from moral integrity, has, beyond all question, attracted a great many into it, for the purpose of perpetrating their thievish propensities in a more genteel manner than comports with the occupations to which they more naturally incline.

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[1] Jeffreys is reported to have said to Mr Wallop, on Baxter's trial, "I observe you are in all these dirty causes, and were it not for you gentlemen of the long robe, who should have more wit and honesty than to uphold these factious knaves by the chin, we should not be at the pass we are at."

THE CALCUTTA BAR.

The Calcutta bar is able and respectable. The bench possesses the power of calling persons to the bar, but has seldom exercised it, and the barristers, therefore, for the most part, belong either to the English or Irish bar. The judges generally refuse permission to practice to any person who is not furnished with a license from the East India Company. They have also thought proper to limit the number of barristers to twelve, and of this number not above four or five are generally in practice, many of the rest holding lucrative offices in court. The company's advocate is, by etiquette, allowed precedence at the bar. When a man of talents and industry, his emoluments exceed those of any practitioner at the English bar. With a fixed salary of £3,600 per annum and his fees, his annual emoluments have not unfrequently amounted to £20,000 per annum; but, for a person of his condition, Calcutta is a more expensive place to live in than London. The litigation arising from the peculiarities of the Hindoo law of inheritance, and the general litigious character of the natives, are the ample sources of legal emolument. The solicitors at the Calcutta court are numerous; we believe they exceed seventy. A few are very respectable, and in extensive practice. Many are not so respectable and in no practice. A few are officers of the court, as the prothonotary, whose income considerably exceeds that of the chief justice. In 1827, when the above remarks apply, the salary of the chief justice was £7,814; one puisne judge, £5,860; register £22,800; sheriff £4,619. The chief justice receives for his passage to India £1,500, and the puisne judges £1,000 each. The chief justice, after five years' service, as such, is entitled to a pension of £1,000 per annum; after seven years' service, of £1,200; and after ten years, of £2,000 per annum.

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In the late case of *Lewis v. Fullarton*, the master of the rolls in giving judgment, July 17, said: "This is a motion by the plaintiff to restrain the defendants from publishing their 'New and Comprehensive Gazetteer of England and Wales,' as being a piracy from, and infringement of, the copyright of the plaintiff's 'Topographical Dictionary of England, with Historical and Statistical Descriptions.' The work of the plaintiff was partly a compilation and selection from former works, and partly an original composition, and was certainly the subject of copyright. On comparison of the two works, it appeared that a considerable portion of the matter in the plaintiff's work had found its way into the defendant's. An injunction ought to be granted wherever a copyright exists, and a prejudicial piracy has been committed. Here the plaintiff asked for an injunction to restrain the defendant from publishing the whole or any part of his (the defendant's) gazetteer; but as there are parts not borrowed from the plaintiff's work, he (the master) could not grant the injunction in those terms, but he would grant the injunction without waiting until the parts pirated could be ascertained, to restrain the publication of those parts of the defendant's work which were pirated, and his order was, that the defendant and his agents should be restrained from further printing,

publishing, selling or disposing of any copies of the defendant's work, containg any article or passage copied, taken, or colorably altered from the plaintiff's work."

SIR THOMAS MORE.

That bribery was not uncommon in the English courts of justice, during the reign of Henry VIII, may be gathered from an accusation against Sir Thomas More; and the keen wit, and cool self-possession of that remarkable man were never displayed to better advantage than on the occasion. Having made a decree against one Parnell, the latter complained to the king, that the chancellor had, by the hands of his wife, taken from him "a great gilt cup," as a bribe. Sir Thomas being summoned before the council, to answer this accusation, "where the matter," says his biographer, Roper, "was most heinously laid to his charge, he forthwith confessed that forasmuch as that cup was long after the foresaid decree, he, upon his importunate pressing upon him thereof, of courtesy refused not to receive it." Lord Wiltshire, who disliked More, and who does not appear to have been aware of his jocular vein, immediately exclaimed, "Lo, my Lords! Did I not tell you, my lords, that you would find this matter true?" Sir Thomas desired their lordships, "that as they had heard him courteously tell the one part of his tale, so that they would vouchsafe of their honors indifferently to hear the other." After which obtained, he further declared to them, "that albeit he had, indeed, with much work, received that cup, yet immediately thereupon, caused he his butler to fill it with wine, and of that cup drank to her; and that when he had so done, and she pledged him, then, as freely as her husband had given it to him, even so freely gave he the same to her to give unto her husband for her new year's gift, which, at his instant request, though much against her will, at length she was fain to receive, as herself and certain others then before them deposed." "Thus," adds Roper, "was the great mountain turned scant into a little mole hill."

VULGAR ERRORS.

That leases are made for 999 years, because a lease for 1000 years would create a freehold. That deeds executed on Sunday are void. That in order to disinherit an heir-at-law it is necessary to give him a shilling by the will, for that otherwise he would be entitled to the whole property. That a funeral passing over any place makes it a public highway. That the body of a debtor may be taken in execution after his death. That a man marrying a woman who is in debt, if he take her from the hands of the priest clothed only in her shift, will not be liable for her engagements. That those who are born at sea belong to Stepney parish. That second cousins may not marry though first cousins may. That a husband has the power of divorcing his wife by selling her in open market with a halter round her neck. That a woman marrying a man under the gallows will save him from execution. That if a criminal has been hung and revives, he cannot afterwards be executed. That the owners of asses are obliged to crop their ears, lest the length of them should frighten the horses.

MONTHLY LIST OF INSOLVENTS.

Insolvents.	*Occupation.*	*Place of Business.*	*Warrant issued.*
Bailey, Edwin,	Housewright,	Boston,	August 19.
Baker, Hunaman,		Rochester,	July 29.
Bates, Francis L.,	Mason,	Watertown,	August 1.
Belcher, Jonathan W.	Boot Manufacturer,	Randolph,	August 3.
Bell, Thomas,		Middleborough,	August 6.
Bowers, Charles,	Cordwainer,	Concord,	August 18.
Brigham, Solomon,	Trader,	Grafton,	August 10.
Campbell, James,	Trader,	Lowell,	August 13.
Cummings, Jepthah,	Yeoman,	Chelmsford,	August 17.
Cutler, Marshall,	Carpenter,	Woburn,	August 12.
Cobb, Sylvester F.,	Nailor,	East Bridgwater,	August 12.
Dascomb, Philip F.,	Innholder,	Boston,	August 18.
Doe, William H.	Carpenter,	Boston,	August 17.
Edson, Nathaniel T.,	Coachmaker,	Dorchester,	August 10.
Fogg, William S.	Trader,	Boston,	August 3.
Faxon, Isaiah,	Trader,	Boston,	August 22.
Foster, Benjamin, J.	Coal Merchant,	Charlestown,	August 17.
Gibbs, George C.		Rochester,	August 13.
Greenwood, James W. [*Moses M. Rice & Co.*	Trader,	Brighton,	August 25.
Haskell, Charles, [*Haskell & Whitney.*	Merchant,	Boston,	July 28.
Haskins, John,	Manufacturer,	Roxbury,	August 10.
Henley, Samuel,		Duxbury,	August 11.
Howarth, John,	Bookbinder,	Boston,	July 29.
Keith, Willard, [*Herman Washburn & Co.*		East Bridgewater,	August 18.
Kendall, William B.,	Broker,	Boston,	August 21.
Leman, E. C.	Cork Cutter,	Boston,	July 29.
Lincoln, George F. H.	Grocer,	Boston,	July 28.
Lincoln, Lewis,	Husbandman,	Wayland,	July 29
Litchfield, Cummings,	Shipwright,	Scituate,	August 17.
McGrath, James,	Cordwainer,	Natick,	August 18.
Merritt, Russell A.	Trader,	Boston,	August 26.
Mills, Henry,		New Bedford,	July 31.
Moore, Emery N. [*Moore & Gay.*	Printer,	Boston,	August 22.
Moriarty, John M.	Physician,	Gloucester,	August 22.
Parker, Richard G.	Teacher,	Boston,	August 13.
Parlin, Asher,	Shoe Manufacturer,	Natick,	August 6.
Peirce, Charles,	Mason,	Boston,	July 29.
Peirce, Thomas J.	Trader,	Boston,	August 10.
Pomeroy, William H.,	Bookeeper,	Boston,	August 1.
Rice, Moses M [*Moses M. Rice & Co.*	Trader,	Brighton,	August 25.
Riley, Joseph, [*Riley & White.*	Shoe dealers,	Boston,	August 20.
Roberts, George,	Printer,	Boston,	August 4.
Rolf, John,	Carpenter,	Lowell,	August 8.
Salvo, Benedict,	Merchant Tailor,	Boston,	August 3.
Smith, Harrison,	Yeoman,	North Bridgewater,	August 19.
Trow, William C., [*Herman Washburn & Co.*		East Bridgewater,	August 18.
Washburn, Herman, [*Herman Washburn & Co.*		East Bridgewater,	August 18.
White, Danford, [*Riley & White.*	Shoe dealers,	Boston,	August 20.
Whitney, John F. [*Haskell & Whitney.*	Merchant,	Boston,	July 28.

NEW PUBLICATIONS.

Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By Octavius Pickering, Counsellor at Law. Volume xxii. Boston: 1840. [This volume commences with the cases argued and determined in Suffolk, March Term, 1839, and ends with those in Worcester, October Term, of the same year. It will probably require another volume to complete Mr Pickering's cases, and the 18th and 19th volumes are not yet published.]

The Papers of James Madison, purchased by order of Congress; being his Correspondence and Reports of Debates during the Congress of the Confederation and his Reports of Debates in the Federal Convention; now published from the original manuscripts, deposited in the department of state, by direction of the Joint Library Committtee of Congress, under the superintendence of *Henry D. Gilpin*. In three volumes. Washington.

A Digest of the Cases decided in the Superior Courts of Law of the State of South Carolina; from the earliest period to the present time. With tables of the names of the Cases, and of the Titles and References. By *William Rice*, Attorney at Law. In two volumes. Charleston.

Machiavel's Political Discourses upon the first Decade of Livy. Interspersed with various reflections. Louisville.

A Treatise on the Common Law in relation to Water Courses. By *Joseph K. Angell*. Second Edition, much enlarged. Boston.

Condensed Reports of Cases decided in the High Court of Chancery in Ireland. Edited by *E. D. Ingraham*, Esq, Counsellor at Law. Vol. xii. Philadelphia.

Reports of Select Cases decided in the Court of Appeals of Kentucky, during the Spring term of the year 1839. By *James G. Dana*. Vol. viii. Frankfort.

In Press.—Commentaries on Equity Pleading. By *Joseph Story*. 2d edition, with additions.

TO READERS AND CORRESPONDENTS.

There have been several trials in England of late, of great and peculiar interest, some of which have been imperfectly reported in the prints in this country. Among them may be mentioned the case of *Heaviside v. Lardner* for crim. con. in which the jury returned a verdict for the plaintiff of £8,000 damages. We have prepared a full report of this trial from the London papers and hope to find room for it all in an early number. The high position occupied by Dr Lardner, as a scientific man, for many years, apart from the extraordinary circumstances of the case, rendered the trial peculiarly interesting.

We also have on hand a report of the trial of Oxford for high treason, in shooting at the Queen; and of Barratt for the abduction of a lady from a boarding school.

We have received the opinions of Chief Justice Gibson, of Pennsylvania, in the cases of *Adams v. Humes* and the *Cumberland Valley Rail Road v. Baab*; also of Judges Pettit and Stroud, in the case of *Thayer v. Bank of the United States*, and of Judge Jones in the case of *Newton v. Bank of the United States*—a part or all of which will appear in our next.

Our next number will also contain the opinion of Judge Story in the case of *Ryan and others v. Goodwin and others*, for an infringement of a patent for "a new and useful improvement in the manufacture of friction matches for the instantaneous production of light."